IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1260 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

PARBAT JETHA AHIR

Versus

STATE OF GUJARAT

Appearance:

MR HARDIK C RAWAL for Petitioners

MR. U.A. TRIVEDI, AGP, for Respondent No. 1

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 07/12/2000

ORAL JUDGEMENT

1. Prabhat Jetha Ahir and others-petitioners (original plaintiffs) have filed this Civil Revision Application challenging the judgement and order dated 20.11.2000 passed by the learned Assistant Judge, Kachchh

at Bhuj, in Civil Miscellaneous Application No. 62 of 2000 wherein the learned Judge was pleased to dismiss the appeal of the appellants. The learned Judge has thereby confirmed the judgement and order dated 15.7.2000 passed by Second Joint Civil Judge (Senior Division), Bhuj, below application Exh. 5 in Regular Civil Suit No. 133 of 2000 wherein the learned Judge was pleased to refuse the injunction prayed for by the plaintiffs below Exh. 5 and reject the said Exh. 5 application.

2. The facts giving rise to this application are as under:

2.1 The petitioners are residents of village Nirona and Palanpur. It has been contended by the petitioners in the suit which has been filed by them that in the year 1958 former Bombay State has constructed Nirona Irrigation Project on river Bharood situated near village Nirona, Taluka Nakhatrana, Dist. Kachchh. At that time it was decided that the water out of the dam which is to be constructed be given to village Nirona and village Bibbar. Ultimately the construction of the dam was started in the year 1959 and it was completed in the year 1968. It has been averred that due to some technical reasons when the dam was constructed, water was given only to the residents of village Nirona from the dam.

2.2 It has been averred in the plaint that somewhere in March 1999 the government decided to review the Irrigation Scheme and decided to give water to the residents of village Bibbar by constructing canal on the left hand bank of the river Bharood.

3. Being aggrieved and dissatisfied with the said action as stated above, the plaintiffs have filed Civil Suit No. 133 of 2000 before the Civil Judge (S.D.), Kachchh. Along with the said suit the plaintiffs have also filed an interim injunction application Exh. 5. In the said suit as well as injunction application it was contended that action of respondent Nos. 1, 2 and 3 in deciding to supply water to village Bibbar is unjust and illegal and if the respondent authorities are not prevented from implementing the revised scheme to supply water to village Bibbar from Nirona Irrigation Scheme, irreparable loss will be caused to the plaintiffs. It was contended that action of respondent Nos. 1 to 3 being unjust and illegal and also against the public interest so also politically motivated, the plaintiffs have filed the suit for declaration and permanent injunction before the trial Court and prayed to declare that action of respondent Nos. 1 to 3 to construct canal

on left hand bank of river Bharood on Nirona dam to supply water to village Bibbar by revising the scheme after more than 30 years is illegal and against the public interest and against the basic scheme of Nirona dam. The plaintiffs have also prayed for injunction against the respondents not to proceed with any activity in respect of advertisement published in daily edition of Kachchh Mitra dated 17.3.2000 and to prevent respondent Nos. 1 to 3 from constructing canal on left hand bank of Nirona dam.

4. Before the trial court in Civil Suit No. 133 of 2000 the defendant State Government filed reply to injunction application as well as the suit at Exh. 12. In the said reply it was contended that the government had originally given sanction for constructing dam by administrative order dated 28.7.1959 for Rs. 48.48 lakhs. It was originally decided to give 65% of water to village Bibbar and 35% of water to the inhabitants of village Nirona. It was also stated that people of village Bibbar have represented to the government that they were deprived of water and government supplied some water out of the said dam and therefore government decided to release some water to 800 hectors land of village Bibbar. It was also stated that right from 1968 till 1999 the village Nirona obtained water from the said dam. Now the government decided to give some water to village Bibbar i.e. only 12% of the total storage of water. It was therefore contended that plaintiffs will not suffer any irreparable injury, loss or hardship if some water, namely 12% of the total storage of water, is given to village Bibbar. On the other had if the court issued any interim injunction against construction of canal, the respondents will suffer irreparable injury, loss and hardship particularly people of village Bibbar in this behalf who will be deprived of the water. If the government is allowed to release water to the people of village Bibbar then the government will be able to earn revenue in this behalf and therefore the release of water to the people of village Bibbar is in the larger interest of the public and balance of convenience lies in favour of the State government. The second Joint Civil Judge (S.D.), Bhuj-Kachchh by his judgement and order dated 15.7.2000 was pleased to reject the said injunction application of the plaintiff.

5. Being aggrieved and dissatisfied with the said judgement and order the original plaintiff-appellant appeal on 19.7.2000 before the District Court, Bhuj. The Assistant Judge, Kachchh-Bhuj by its order in Civil Misc. Appeal No. 62 of 2000 was pleased to reject the said revision application thereby confirming the order of the trial court.

6. Being aggrieved and dissatisfied with the said judgement and order of the learned Judge, the original plaintiff-petitioner had filed this revision application before this court on 30.11.2000. Mr. Hardik Raval, learned counsel for the petitioner contended that in this case, it is no doubt true that the government originally in the scheme of 1958 decided to release water in favour of village Nirona and village Bibbar but ultimately when the dam was constructed in the year 1968 due to technical problem the government decided to release water in favour of Nirona and had continued upto 1999. He submitted that the government suddenly without any basis decided to release water in favour of the people of Bibbar and that will affect a large number of people of village Nirona and the present suit has been filed. The learned counsel for the petitioners has stated that though it was a policy decision of the government to release water in favour of the people of village Bibbar, the same is arbitrary and without any consultation with the people of the village Nirona and therefore the said decision is illegal, invalid and liable to be set aside. The learned counsel for the petitioners has relied on the judgement of the Hon'ble Supreme Court in the case of MAHABIR AUTO STORES VS. INDIAN OIL CORPORATION reported in AIR 1990 SC 1031 in which at para 18 the Hon'ble Supreme Court has observed thus:

> "Having considered the facts and circumstances of the case and the nature of the contentions and the dealings between the parties and in view of the present state of law, we are of the opinion that decision of the State/public authority under Article 298 of the Constitution, is an administrative decision and can be impeached on the ground that the decision is arbitrary or violative of Article 14 of the Constitution of India on any of the grounds available in public law field. It appears to us that in respect of Corporation like IOC when without informing the parties concerned, as in the instant case of the appellant firm herein on alleged change of policy and on that basis action to seek to bring to an end the course of transaction over 18 years involving large amounts of money is not fair action, especially in view of the monopolistic nature of the power of the respondent in this field. Therefore, it is necessary to reiterate that even in the field of public law, the relevant persons concerned or to be affected, should be taken into confidence."

7. He has relied the judgement of the Orissa High Court in the case of BHAGABAN VS. BAIRAGI reported in AIR 1964 Orissa 161 in which at para 7 on page 166 it is observed as under:

> "In the light of the aforesaid principles the issue involved in this case must be determined. Plaintiffs' simple case is that they are entitled to the entire volume of water flowing in river Sirram at point A which passes to river Jaypur. Both the courts have concurrently accepted the plaintiffs' case on this point. The learned subordinate Judge has given a further declaration that this right of the plaintiffs is subject to reasonable use by the defendants as riparian owners higher up the stream. This position is correct in law. Plaintiffs, prayer is for closure of the newly constructed artificial channel connecting river Sriram at a point in plot No. 273 to a point in the same river below C in plot No. 280. On the findings of the court below and on the basis of the judgement in T.S. No. 340 of 1940, the position is very clear that the water does not flow in river Sriram beyond point A by the construction of the dams at points A, B and C. The channel purported to divert the water of the river from an upper limit to itself at a lower limit entirely for non-riparian use and contrary to the decree in T.S. No. 340 of 1940 and to the rights of the plaintiffs to get the accustomed flow of water at point A. Defendants have absolutely no right to do so. As no water flows in river Sriram beyond A, plot Nos. 2/4, 275, 2999 and 280 are non-riparian tenements. Defendants have not established the case that the ownership of the aforesaid plots vests in the persons who are the owners of the newly excavated channel."

8 Mr. Umesh A. Trivedi, learned A.G.P. on behalf of the State government contended that to give water to village Bibbar is a policy decision of the government and the question of policy is essentially for the State to decide as the policy depends on number of circumstances and the government has right to adopt any particular policy in this behalf. For that purpose he has relied on the decision of the Hon'ble Supreme Court in the case of B.C. & CO. VS. UNION OF INDIA reported in AIR 1973 SC 106 in which on page 133 at para 100 it is observed as follows:-

"That there can be no unlimited right to acquire or use a scarce commodity like newsprint can admit of no doubt. The argument of the petitioners that Government should have accorded greater priority to the import of newsprint to supply the need of all newspaper proprietors to the maximum extent is a matter relating to the policy of import and this Court cannot be propelled into the unchartered ocean of Governmental policy."

9. He has also relied on the judgement of the Supreme Court in the case of STATE OF U.P. VS. VIJAY BAHADUR SINGH reported in AIR 1982 SC 1234 particularly para 3 of the judgement where the Government was entitled to change or revise its policy subsequent to the acceptance of the provisional bid. Therefore, the Government could refuse to accept the highest bids and could allot the lots to the Forest Corporation and thus implement the policy of legislature envisaged by the U.P. Forest Corporation Act. Even if there was no express policy decision of the government recorded after the date of auction it was implicit in the very action of the government in cancelling the auction and allotting the forest lots to the Forest Corporation.

10. He has also relied on the judgement of the Supreme Court in the case of STATE OF PUNJAB VS. RAM LUBHAYA BAGGA reported in AIR 1998 SC 1703 in which at para 25 it is inter alia held as follows:

"When government forms its policy, it is based on number of circumstances on facts, law including constrains based on its resources. It is also based on expert opinion. It would be dangerous if Court is asked to test the utility, beneficial effect of the policy or its appraisal based on facts set out on affidavits. The Court would dissuade itself from entering into this realm which belongs to the executive. It is within this matrix that it is to be seen whether the new policy violates Article 21 when it restricts reimbursement on account of its financial constraints."

He has also relied on the judgement in the case of PENNAR DELTA AUYACUTDARS ASSOCIATION VS. GOVERNMENT OF A.P. reported in AIR 2000 Andra Pradesh 317. In paragraphs Nos. 36, 42 and 44 the Hon'ble Supreme Court observed thus:

"Para 36 - ... The question that would immediately arise for consideration is as to how best the existing water is to be utilised by the State. In my considered opinion, it is for the State to decide as to how the existing available water may have to be utilised and managed. It requires expertise. Undoubtedly, it would be a matter of choice by way of policy decision. Such a policy decision, if taken by the State cannot be interfered with by this court merely because there is a possibility of an alternative policy choice. Such a course is not permissible.

Para 42 - The question relates to the best utilisation of available water and the pragmatic assessment of the situation in the public interest. The decision of the respondents is stated to have been taken in public interest. The question of infringement of fundamental rights guaranteed by Article 21 does not arise in such a situation.

Para 44 - The Court in the instant case cannot indulge in an act of nice balancing. This is not a case where this Court is called upon to give effect to any directive principles of State policy and fundamental duties. It is not a case of Court shrugging its shoulders. The entire material available on record is taken into consideration and upon such consideration, the Court is of the opinion that the situation on hand is not a judicially manageable one. This Court cannot decide as to what quantity of water should be made available for drinking water purpose and what quantity of water should be made available for irrigation. The Court cannot compel the respondents to utilise the water from the dead storage. Any such direction from this Court is fraught with serious consequences. Such a direction from this Court may result in unmanageable situation leading to unimaginable consequences. The Court in exercise of its judicial review jurisdiction cannot interfere in a matter of this nature, purely based on the self-serving averments made in the affidavit filed by the interested parties. Such a course is not permissible in law."

11. Learned counsel further stated that in any view of the matter this Court should not give injunction in

light of the decision in the case of RAMUBHAI DAHYABHAI RATHOD VS. SURAT MUNICIPAL CORPORATION reported in AIR 2000 Guj. P. 292.

12. He has also relied on the decision in the case of RAUNAQ INTERNATIONAL LTD. VS. I.V.R. CONSTRUCTION LTD. reported in AIR 1999 SC 393 in which on page 397 at para 11 it is observed thus:

> "When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the Court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the Court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that Court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the Court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the Court is satisfied that there is substantial amount of public interest or the transaction is entered into mala fide, the Court should not intervene under Article 226 in disputes between two rival tenderers."

13. Similarly, relying on the decision of this court in the case of RAMUBHAI DAHYABHAI RATHOD VS. SURAT MUNICIPAL CORPORATION (supra) the learned counsel contended that when the element of public interest is involved then this court should be slow in granting injunction in this behalf.

14. I have considered the factual aspects as well as legal aspect of the matter. It may be stated that in fact, the original policy of the government in 1958 envisaged to release water in favour of village Bibbar. However, in the year 1968 when the construction of dam was over, due to technical problem the government decided to give water to the village Nirona which does not confer any vested right in favour of the plaintiff village exclusively and deny the water to village Bibbar. I have

already gone through the affidavit filed by the government in this behalf. I have also gone through the reasoning given by the trial court as well as the appellate court and in my view the courts below have come to the right conclusion that the plaintiff failed to make out a prima facie case and also irreparable injury in this behalf. On the other hand if injunction is granted, the people of village Bibbar will suffer irreparable injury when they were deprived of water in this behalf. The State government has stated that only 12% of the water is given to village Bibbar and the plaintiff will not suffer any irreparable loss or injury.

15. In view of the decision of the Hon'ble Supreme Court it is a question of policy of the government and for change of policy government has adequate material and the said policy decision of the government is in the interest of a large number of public and it cannot be said to be arbitrary policy in this behalf.

In view of the same, I reject the revision application with no order as to costs.

00000

(pkn)